S L Ng Trading Agency Sdn Bhd v Tohtonku Sdn Bhd

HIGH COURT (PENANG) — CIVIL SUIT NO PA-22NCvC-7–01 OF 2025
QUAY CHEW SOON J
30 APRIL 2025

Civil Procedure — Striking out — Abuse of process of court — Plaintiff ('P') sued for payment of debt by defendant ('D') sued D in another branch of High Court based on the same subject-matter — P sought injunction in its suit to bar D from claiming its debt, terminating its contract with P or engaging third parties to take over P's role under the contract — Whether P's suit was clear abuse of process and plain and obvious case for striking out — Whether P's suit was deliberately duplicitous, a tactical manoeuvre to frustrate D's suit and forum-shopping — Whether P's application to transfer its suit to consolidate it with D's suit was not bona fide but an afterthought to enhance its chances of success against D

The parties herein entered into a distributor agreement ('DA') under which the plaintiff ('P') was to distribute within Peninsular Malaysia household consumer products that it bought from the defendant ('D'). P fell into arrears in making payments for the purchases and when the debt snowballed into almost RM65m, D terminated the DA and appointed ten new distributors to take over P's place. On 8 January 2025, D sued P in the High Court at Kuala Lumpur ('the KL suit') to recover its debt and associated damages. The following day, D's solicitors wrote to P's solicitors to ask if they had instructions to accept service of the writ and statement of claim. P's solicitors did not reply. Instead, two days later, P filed a suit against D pertaining to the DA in the High Court at Penang ('the PG suit') and concurrently applied for an ex parte injunction to restrain D from: (a) terminating the DA or from giving effect to any termination of the DA; (b) demanding from P any sum of money in relation to the DA; and (c) engaging any third party to take over P's role or rights under the DA, until such time the PG suit had been finally disposed of or the court had made any further order. P never disclosed to D that it had filed the PG suit and the ex parte injunction application. Only after the ex parte injunction application was dismissed on 15 January 2025, did P serve the writ of summons and statement of claim in the PG suit on D. D immediately applied to strike out the PG suit, by which time P had already filed another inter partes ad interim injunction application in the PG suit. Four days after the ad interim injunction application was dismissed, P applied to transfer the PG suit to the Kuala Lumpur High Court to be consolidated and heard together with the KL suit.

Held, striking out the PG Suit and the transfer application and dismissing the ad interim injunction application:

(1) The inter partes ad interim injunction application was dismissed because:(a) there was no status quo to be preserved as the DA was already terminated on 3 January 2025; (b) the PG Suit was an abuse of process of court as P was guilty of forum-shopping. P ought to have filed its claim by way of a counterclaim in the KL Suit; (c) the substance of the reliefs prayed for in the ad interim injunction application amounted to a mandatory injunction. Granting the same would tantamount to granting the final relief sought by P in the PG Suit (ie for specific performance of the DA); and (d) damages were an adequate remedy if the termination of the DA was found to be invalid (see para 34).

(2) The PG Suit was an abuse of process of court and was a plain and obvious case for striking out (see para 41): (a) P had no good reason to file the PG Suit — as it was aware that D had already filed the KL Suit concerning the same subject-matter — other than to forum-shop with the ulterior motive of obtaining an ex parte injunction to stay the KL Suit. This smacked of abuse of process; (b) the KL Suit was the natural forum for the determination of the dispute between the parties as: (i) the parties agreed under the DA to submit to the jurisdiction and venue of the courts in Kuala Lumpur; and (ii) the main business operations under the DA were carried out in the Klang Valley where both parties had their respective offices and distribution centres. D's main representatives were based in and resided in the Klang Valley; (c) by filing the PG Suit and ex parte injunction, P sought to obtain an unfair advantage by staying the KL Suit and denying the court of the opportunity of hearing the counterparty's version of events; (d) P's conduct in the PG Suit was aimed at staying D's claims in the KL Suit. The restraining orders sought by P would have caused the Penang High Court to intrude into and interfere with the power and jurisdiction of the Kuala Lumpur High Court and prejudiced D by preventing it from proceeding with its claims against P; and (e) P's filing of the PG Suit gave rise to a duplicity of proceedings when the issues it raised in that suit could have been counterclaimed in the KL Suit (see paras 7, 49 & 55–57).

(3) The transfer application was yet another attempt to abuse the process of the court. It was an afterthought following the court's dismissal of P's injunction applications. Initially, P claimed that the High Court at Penang was the forum conveniens and prosecuted the PG Suit on that basis, even though all relevant factors that determined forum conveniens pointed towards the Kuala Lumpur High Court being the natural forum. P's subsequent change of stance to say that the Kuala Lumpur High Court was the forum conveniens amounted to forum-shopping and was

an attempt to avoid adverse findings being made against it and to enhance its chances of success against D (see paras 59–62 & 68).

[Bahasa Malaysia summary

Pihak-pihak telah memeterai perjanjian mengedar ('DA') di mana plaintif ('P') akan mengedarkan produk pengguna isi rumah di Semenanjung Malaysia yang dibelinya daripada defendan ('D'). P mempunyai tunggakan pembayaran untuk pembelian tersebut dan apabila hutang meningkat kepada hampir RM65 juta, D menamatkan DA dan melantik 10 pengedar baharu untuk mengambil alih tempat P. Pada 8 Januari 2025, D menyaman P di Mahkamah Tinggi di Kuala Lumpur ('Saman KL') untuk membayar hutangnya dan ganti rugi yang berkaitan. Keesokan harinya, peguam D menulis kepada peguam P untuk bertanya sama ada mereka mempunyai arahan untuk menerima penyampaian writ dan pernyataan tuntutan. Peguam P tidak menjawab. Sebaliknya, dua hari kemudian, P memfailkan saman terhadap D yang berkaitan dengan DA tersebut di Mahkamah Tinggi di Pulau Pinang ('Saman PG') dan pada masa yang sama memohon injunksi ex parte untuk menghalang D daripada: (a) menamatkan DA atau daripada memberi kesan kepada mana-mana penamatan DA; (b) menuntut daripada P sebarang jumlah wang dibawah DA; dan (c) melibatkan mana-mana pihak ketiga untuk mengambil alih peranan atau hak P di bawah DA, sehingga Saman PG akhirnya diputuskan atau Mahkamah telah membuat sebarang perintah selanjutnya. P tidak pernah mendedahkan kepada D bahawa mereka telah memfailkan Saman PG dan permohonan injunksi ex parte. Hanya selepas permohonan injunksi ex parte ditolak pada 15 Januari 2025, P menyampaikan writ saman dan pernyataan tuntutan Saman PG pada D. D segera memohon untuk membatalkan Saman PG, pada masa itu P telah memfailkan satu lagi permohonan injunksi ad interim antara pihak dalam Saman PG. Empat hari selepas permohonan injunksi ad interim ditolak, P memohon untuk memindahkan Saman PG ke Mahkamah Tinggi Kuala Lumpur untuk digabungkan dan didengar bersama-sama dengan Saman KL.

Diputuskan, membatalkan Saman PG dan permohonan pemindahan kes dan mengenepikan permohonan injunksi interim:

(1) Permohonan injunksi ad interim antara pihak ditolak kerana: (a) tiada status quo yang perlu dikekalkan kerana DA telah ditamatkan pada 3 Januari 2025; (b) Saman PG adalah penyalahgunaan proses mahkamah kerana P bersalah kerana mencuba nasib di pelbagai forum. P sepatutnya memfailkan tuntutannya melalui tuntutan balas dalam Saman KL; (c) inti pati relif yang dipohon dalam permohonan injunksi ad interim merupakan injunksi mandatori. Membenarkan injunksi tersebut sama dengan membenarkan relif akhir yang dipilidkan oleh P dalam Saman PG (iaitu untuk perlaksanaan spesifik DA); dan (d) ganti rugi adalah

remedi yang mencukupi sekiranya penamatan DA didapati tidak sah (lihat perenggan 34).

(2) Saman PG adalah penyalahgunaan proses mahkamah dan merupakan kes yang jelas untuk dibatalkan: (a) P tidak mempunyai alasan yang kukuh untuk memfailkan Saman PG — kerana menyedari bahawa D telah memfailkan Saman KL mengenai perkara yang sama — selain dari cuba nasib untuk di pelbagai forum dan motif tersembunyi untuk mendapatkan injunksi ex parte untuk menangguhkan Saman KL. Hal ini merupakan penyalahgunaan proses; (b) Saman KL adalah forum yang betul untuk penentuan pertikaian antara pihak-pihak kerana: (i) pihak-pihak bersetuju di bawah DA untuk menyerahkan kepada bidang kuasa dan tempat Mahkamah di Kuala Lumpur; dan (ii) operasi perniagaan utama di bawah DA dijalankan di Lembah Klang di mana kedua-dua pihak mempunyai pejabat dan pusat pengedaran masing-masing. Wakil utama D berpusat dan menetap di Lembah Klang; (c) dengan memfailkan Saman PG dan injunksi ex parte, P berusaha untuk mendapatkan kelebihan yang tidak adil dengan menangguhkan Saman KL dan menafikan peluang mahkamah untuk mendengar versi peristiwa rakan niaga; (d) tindakan P dalam Saman PG bertujuan untuk menangguhkan tuntutan D dalam Saman KL. Perintah sekatan yang dipohon oleh P akan menyebabkan Mahkamah Tinggi Pulau Pinang menceroboh dan mengganggu kuasa dan bidang kuasa Mahkamah Tinggi Kuala Lumpur dan merugikan D dengan menghalangnya daripada meneruskan tuntutannya terhadap P; dan (e) pemfailan Saman PG oleh P menimbulkan pertindihan prosiding apabila isu-isu yang dibangkitkan dalam saman itu boleh dituntut balas dalam Saman KL (lihat perenggan 7, 49 & 55–57).

(3) Permohonan pemindahan itu merupakan satu lagi percubaan untuk menyalahgunakan proses mahkamah. Ianya merupakan pemikiran kemudian selepas mahkamah menolak permohonan injunksi P. Pada mulanya, P mendakwa bahawa Mahkamah Tinggi di Pulau Pinang adalah forum conveniens dan memfailkan Saman PG atas dasar itu, walaupun semua faktor relevan yang menentukan forum conveniens menunjukkan bahawa Mahkamah Tinggi Kuala Lumpur adalah forum yang betul. Perubahan pendirian P seterusnya yang mengatakan bahawa Mahkamah Tinggi Kuala Lumpur adalah forum conveniens merupakan cubaannya untuk memfailkan kes di pelbagai forum dan merupakan percubaan untuk mengelakkan keputusan yang tidak menyebelahinya dan cubaan untuk meningkatkan peluang kesnya untuk berjaya terhadap D (lihat perenggan 59–62 & 68).]

Cases referred to

Adrian Casperz v Garry & Warren Smith Pty Ltd & Ors [2023] VSCA 264, CA (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36; [1993] 4 CLJ 7; [1993] 2 AMR 1969, SC (refd)
Casperz v Garry & Warren Smith Pty Ltd (Civil Claims) [2022] VCAT 1102 (refd)
Jasa Keramat Sdn Bhd & Anor v Monatech (M) Sdn Bhd [1999] 4 MLJ 637, CA (refd)
Khairy Jamaluddin v Dato' Seri Anwar bin Ibrahim [2013] 4 MLJ 173, CA (refd)
Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra [2019] 2 SLR 372, CA (refd)
Mayban Allied Bhd (formerly known as Phileo Allied Bank (M) Bhd) v Kenneth Godfrey Gomez & Anor [2011] 5 MLJ 219, CA (refd)
Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd [1993] 3 MLJ 16; [1993] 3 CLJ 606, SC (refd)
Seetha a/p Kumarasamy v Aker Solutions Malaysia Sdn Bhd (sebelum ini dikenali sebagai Aker Kvaerner Malaysia Sdn Bhd) & Ors [2022] MLJU 3277; [2022] CLJU 3049, HC (refd)
Shih-Hua Investment Co Ltd v Zhang Aidong & 5 Ors [2018] HKCFI 1234 (refd)
Sykt Rodziah (sued as a firm) v Malayan Banking Bhd [2021] 5 MLJ 688, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 s 23(1)(b)
Rules of Court 2012 O 18 r 19, 19(1)(d), O 29 r 1, 1(2A), 1(2A)(c), O 57 r 1
Specific Reliefs Act 1950 ss 50, 51(1)

Ravenesan Sivanesan (Tay Li Sheng with him) (S Ravenesan) for the plaintiff.
Chok Zhin Theng (Michelle Chin Zi Shan and Lim Su Yie with him) (Cheah Teh Su) for the defendant.

Quay Chew Soon J:

INTRODUCTION

[1] These three applications were heard together:

(a) encl 9 dated 20 January 2025. This is the plaintiff's ('P') application on an inter partes basis for an interim injunction ('inter partes injunction application'), pending the disposal of this suit ('PGHC suit'). Enclosure 9 is made under ss 50 and 51(1) of the Specific Reliefs Act 1950 and O 29 r 1 of the Rules of Court 2012;

(b) encl 17 dated 7 February 2025. This is the defendant's ('D') application to strike out the PGHC suit ('striking out application'). Enclosure 17 is made under O 18 r 19(1)(d) of the Rules of Court 2012; and

(c) encl 25 dated 14 February 2025. This is P's application to transfer the PGHC suit to the Kuala Lumpur High Court ('transfer application'), to be consolidated and heard together with Suit No WA-22NCvC-16–01 of 2025 ('KLHC suit'). Enclosure 25 is made under O 57 r 1 of the Rules of Court 2012.

[2] On 27 March 2025, I dismissed encl 9 (P's inter partes injunction application). Further, I allowed encl 17 (D's striking out application), and struck out the PGHC suit. Consequently, I granted leave for P to withdraw encl 25 (P's transfer application), since it had become academic. As a result of the PGHC suit being struck out, there is nothing left to be transferred. Here are the grounds of my decision.

STRIKING OUT APPLICATION (ENCL 17)

[3] Enclosure 17 is D's application to strike out the PGHC suit on the ground that P is guilty of forum — shopping and tactical manoeuvre. In that P filed this subsequent PGHC suit with the ulterior motive of trying to steal a march on D. And to obtain an ex parte injunction to restrain D's KLHC suit against P, that was filed earlier in time.

TRANSFER APPLICATION (ENCL 25)

[4] Enclosure 25 is P's application to transfer this subsequent PGHC suit to the Kuala Lumpur High Court, to be consolidated and heard together with the KLHC suit. This is on the ground that the Kuala Lumpur High Court is the forum conveniens.

BACKGROUND FACTS

Parties

[5] D carries on the business of manufacturing and supplying household consumer products. P is in the business of distributing consumer products.

Master distributor agreement

[6] The parties entered into a master distributor agreement dated 18 February 2019 ('master distributor agreement'), for P to purchase consumer products from D and distribute the same within Peninsular Malaysia.

[7] Clause 13.8 of the master distributor agreement stipulates that both parties agree to submit to the jurisdiction and venue of the courts in Kuala Lumpur. It reads:

13.8 This Agreement shall be construed and interpreted in accordance with the laws of Malaysia and both parties agree to submit to the *jurisdiction and venue of the Courts in Kuala Lumpur.*

[8] As per the preamble of the master distributor agreement, D's business office is situated in the Klang Valley (ie Subang Jaya, Selangor):

BETWEEN

TOHTONKU SDN BHD (COMPANY NO. 38311-A) a company incorporated in Malaysia and having its business office at No. 10, Jalan TP 2, Taman Perindustrian UEP Subang Jaya, 47620 Subang Jaya, Selangor Darul Ehsan, Malaysia (hereinafter referred to as "TTK");

AND

S.L. NG TRADING AGENCY SDN BHD (Company No. 413026-K), a company incorporated in Malaysia and having its registered office at HS (M) 3700, PTD 149229, Jalan Berjaya 8, Taman Perindustrian Berjaya, Kempas Lama, 81200 Johor Bahru, Malaysia. (hereinafter referred to as "Distributor").

[9] This is also reflected in the notice clause at cl 13.6 of the master distributor agreement:

13.6 All notices and other communications provided for or permitted hereunder shall be sent by certified or registered mail with postage prepaid, by hand delivery or by facsimile transmission as follows:-

TTK	
Name:	**Tohtonku Sdn Bhd**
Address:	No.10, Jalan TP 2, Taman Perindustrian UEP Subang Jaya, 47620 Subang Jaya, Selangor, Malaysia.
Facsimile No.:	603 – 8023 3700
Attention:	Jasper Lim Chee Keong
Distributor	
Name:	**S.L. NG Trading Agency Sdn Bhd**
Address:	HS (M) 3700, PTD 149229, Jalan Berjaya 8, Taman Perindustrian Berjaya, Kempas Lama, 81200 Johor Bahru, Malaysia.
Facsimile No.:	607 – 5599 759
Attention:	Eric Ng Chin Kuong

Main business operations in the Klang Valley

[10] From the commencement of business in 2019 until the termination of the master distributor agreement on 3 January 2025, the main business operations under the master distributor agreement were carried out in the Klang Valley. Both parties' respective offices and distribution centers are located within the Klang Valley.

[11] Additionally, the main representatives of D (ie its executive director and its group finance, procurement and supply chain lead), are based in and reside in the Klang Valley.

Notice of breach

[12] The payment terms of D's monthly invoices under the master distributor agreement stipulate that P shall pay D the sums stated in the invoices within 60 days from the date of its issuance ('payment terms'). Under cl 5.2 of the master distributor agreement, the time for payment of the sums due to D is of the essence.

[13] On 30 September 2024, D issued a notice of breach pursuant to cl 8.2 of the master distributor agreement, due to P's default in making payment of D's monthly invoices. At that point in time, the accumulated outstanding sum totalled RM23,197,391.44. P was required to remedy the breach within three months.

[14] On 24 December 2024, P's then solicitors ie Messrs Kriishand G Krishnan ('Messrs KGK') wrote to D, denying that P had breached the payment terms. The letter stated:

> 11. In light of the foregoing, should you still fail, refuse and/or neglect to indicate your position to the proposal above **WITHIN (5) DAYS** from the date of this letter, our client believe it is high time to refer the aforementioned disputes to the court for determination and declaration of our client's rights under the MDA.

[15] On 30 December 2024, P itself wrote directly to D as follows:

> Dear Carol,
>
> We refer to the above matter and your email dated 27.12.2024.
>
> Please be informed we will not be attending the proposed meeting at 3.00p.m. today.
>
> As we are now represented by our solicitors, Messrs Kriishand G Krishnan, kindly direct all further communications regarding this matter through our solicitors.

Notice of termination

[16] Since P refused to remedy its breach, D terminated the master distributor agreement on 3 January 2025. At that point in time, the accumulated outstanding sum owing by P to D had increased to RM64,974,463.38.

Appointment of new distributors

[17] Post the termination of the master distributor agreement, D appointed ten new distributors to continue with its business.

KLHC suit

[18] On 8 January 2025 (Wednesday), D filed the KLHC suit at the Kuala Lumpur High Court pertaining to the termination of the master distributor agreement. D claimed for the outstanding sum of close to RM65m and associated damages.

Enquiry to Messrs KGK on accepting service

[19] On 9 January 2025 (Thursday), D's solicitors wrote to Messrs KGK (as directed by P on 30 December 2025), enquiring whether they have instructions to accept service of the cause papers in relation to the KLHC suit. Messrs KGK did not reply to this query.

PGHC suit

[20] On 11 January 2025 (Saturday), P filed this subsequent PGHC suit at the Penang High Court. Concurrently, P filed an application for an ex parte injunction via encl 3 ('ex parte injunction application') and a certificate of urgency. P did not inform D of the same, despite being aware that D had already filed the KLHC suit on the same subject matter at the Kuala Lumpur High Court.

Ex parte injunction application

[21] In the ex parte injunction application, P sought the following orders:

1) An interim injunction to restrain the defendant whether acting on its own, and/or through its directors, officers, servants, employees, workmen, agents, nominees and/or parties related to them from terminating, or taking any steps to give effect to the termination of the master distributor agreement entered into between the plaintiff and defendant dated 18 December 2019 vide its notice of termination dated 03 January 2025, until full and final disposal of this action or until further order by this Honourable Court;

2) An interim *injunction to restrain the defendant* whether acting on its own, and/or through its directors, officers, servants, employees, workmen, agents, nominees and/or parties related to them *from demanding any sum of money, either directly or indirectly, from the plaintiff*, in relation to the contract mentioned in prayer (1) above, until full and final disposal of this action or until further order by this Honourable Court;

3) An interim injunction to restrain the defendant whether acting on its own, and/or through its directors, officers, servants, employees, workmen, agents, nominees and/or parties related to them from engaging or entering into any agreement with any third party or supplier to perform the obligations under the contract or any in any manner substituting the plaintiff's role or rights under the contract, until full and final disposal of this action or until further order by this Honourable Court;

[22] Prayer (2) above is noteworthy. It seeks to restrain D from demanding any money from P under the master distributor agreement.

Cause papers for the KLHC suit served on the plaintiff

[23] On 14 January 2025 (Tuesday), D (oblivious of the PGHC suit and the ex parte injunction application) effected service of the writ and the statement of claim in respect of the KLHC suit on P.

Dismissal of the ex parte injunction application

[24] On 15 January 2025 (Wednesday), I dismissed P's ex parte injunction application on the following grounds:

(a) damages is an adequate remedy, if the termination of the master distributor agreement is found to be invalid; and

(b) P's affidavit in support of the ex parte injunction application does not comply with O 29 r 1(2A)(c) of the Rules of Court 2012. In that it did not contain a clear and concise statement of the facts relied on to justify the application ex parte, including details of any notice given to the other party or, if notice has not been given, the reason for not giving notice.

[25] Actually, P's affidavit in support of the ex parte injunction application contains a section titled 'Compliance with O 29 r 1(2A) of the Rules of Court 2012'. It addressed every other limb of that provision, but curiously not sub-para (c) thereof.

Discovery of the existence of the PGHC suit

[26] Shortly thereafter and on the same day ie 15 January 2025 (Wednesday), P's solicitors (Messrs S Ravenesan) wrote to D for the first time. P's solicitors stated that it had commenced the PGHC suit and effected service of the writ and the statement of claim in relation thereto. Notably, P's solicitors omitted any mention of the ex parte injunction application and its dismissal.

Plaintiff's proposal to transfer the PGHC suit to the Kuala Lumpur High Court

[27] On 16 January 2025 (Thursday), P's solicitors (knowing that D was oblivious of the ex parte injunction application and its dismissal) wrote to D's solicitors. P's solicitors made a seemingly innocuous proposal that the PGHC suit be transferred to the Kuala Lumpur High Court, to be heard together with the KLHC suit. D's solicitors responded on the next day (Friday 17 January 2025), by stating that it would revert once it has obtained instructions.

Inter partes injunction application

[28] On 20 January 2025 (following Monday), P filed the inter partes injunction application, which included an ad interim injunction application ('ad interim injunction application') together with a certificate of urgency.

Discovery of the ex parte injunction application and its dismissal

[29] The cause papers of the inter partes injunction application were served on D's solicitors on 22 January 2025 (Wednesday). It revealed the existence of the ex parte injunction application and its dismissal.

[30] On 23 January 2025 (Thursday), D's solicitors wrote to P's solicitors to express shock about the ex parte injunction application. D demanded that P refrain from prosecuting the PGHC suit and take immediate remedial measures, whilst reserving D's right to strike out the PGHC suit.

Case management

[31] Despite D's aforementioned demand, during the case management of the inter partes injunction application on the following day (Friday 24 January 2025), P insisted that an early date be fixed for the hearing of the ad interim injunction application. P took the stance that the PGHC suit was 'seiras dengan prinsip 'forum conveniens', which is inconsistent with its earlier proposal on 16 January 2025 for transfer of the PGHC suit to the Kuala Lumpur High Court.

[32] After the aforesaid case management ended, P entered its appearance in the KLHC suit.

Striking out application

[33] On 7 February 2025, D filed the striking out application to strike out the PGHC suit.

Dismissal of the ad interim injunction application

[34] On 10 February 2025,1 dismissed P's ad interim injunction application on the following grounds:

(a) there is no status quo to be preserved, as the master distributor agreement had already been terminated on 3 January 2025;

(b) the PGHC suit is an abuse of process of the court, as P is guilty of forum shopping by filing the PGHC suit. P ought to have filed its claim by way of a counterclaim in the KLHC suit;

(c) the substance of the reliefs prayed for in the ad interim injunction

application amounts to a mandatory injunction. Granting the same would tantamount to granting the final relief sought by P in the PGHC suit (ie specific performance of the master distributor agreement); and

(d) damages is an adequate remedy, if the termination of the master distributor agreement is found to be invalid.

Plaintiff filed its statement of defence in the KLHC suit

[35] On 12 February 2025, P filed its statement of defence in the KLHC suit. Wherein P raised identical and overlapping issues as those raised by it in the PGHC suit.

Transfer application

[36] On 14 February 2025 (four days after the dismissal of the ad interim injunction application), P filed the transfer application. P seeks to transfer the PGHC suit to the Kuala Lumpur High Court on the ground that the Kuala Lumpur High Court is the forum conveniens.

THE LAW ON STRIKING OUT

[37] The law pertaining to striking out of a party's pleading under O 18 r 19 of the Rules of Court 2012 is settled. It is only in a plain and obvious case that recourse should be had to the summary process under this rule. This summary procedure should only be adopted when it can be clearly seen that a claim is on the face of it obviously unsustainable. It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action (see the Supreme Court decision in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7; [1993] 2 AMR 1969).

[38] The court must be satisfied that there is no reasonable cause of action or that the claim is frivolous or vexatious. The court is not concerned at this stage with the merits of the claim. So long as the pleadings disclose some cause of action or raise some questions fit to be decided by the judge, the mere fact that the case is weak and not likely to succeed at the trial is no ground for the pleadings to be struck out.

[39] In *Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd* [1993] 3 MLJ 16 at p 26; [1993] 3 CLJ 606 at p 612, the Supreme Court remarked that the lower court should have scrutinised the evidence in order to decide whether the action was bound to fail. The Supreme Court said that an action can be summarily disposed if there is an absence of conflict of material evidence or of conflict of affidavits on

material points. So that seemingly triable or difficult issues could be readily decided in such a way as to lead to the conclusion that the action was bound to fail.

[40] In a suit involving complex questions of law but where the essential facts are not in dispute, the complexity of the questions of law should not be a reason for refusing relief under O 18 r 19 of the Rules of Court 2012. If satisfied that the questions of law are unarguable, the court is not prevented from granting summary relief merely because 'the question of law is at first blush of some complexity and therefore takes a little longer to understand' (see the Court of Appeal decision in *Khairy Jamaluddin v Dato' Seri Anwar bin Ibrahim* [2013] 4 MLJ 173 at p 182).

DECISION

[41] Applying these legal principles, it is my finding that the PGHC suit is an abuse of the process of the court. This is a plain and obvious case for striking out. Here is my explanation.

[42] Under O 18 r 19(1)(d) of the Rules of Court 2012, the court has the power to strike out an action on the ground of abuse of process at any stage of the proceedings. An abuse of process of the court is where the true purpose of invoking the court's process is oppressive and not bona fide. Such circumstances are varied and numerous. The categories of such cases are not closed.

[43] In *Jasa Keramat Sdn Bhd & Anor v Monatech (M) Sdn Bhd* [1999] 4 MLJ 637 at p 645 ('Jasa Keramat'), the Court of Appeal remarked:

> It is trite that a person who has a legitimate grievance may invoke the court's process to obtain redress. But cases may arise where the true purpose for invoking the court's process is something other than to obtain a remedy provided by law. It may be to *oppress a defendant*. Or it may be to apply pressure upon him which the law regards as illegitimate.
>
> Since the *circumstances in which the court's process may be abused are varied and numerous*, the *categories of such cases are therefore not closed*. ... Where an action is found to be an abuse of the court's process, it may be struck out ...

[44] In *Mayban Allied Bhd (formerly known as Phileo Allied Bank (M) Bhd) v Kenneth Godfrey Gomez & Anor* [2011] 5 MLJ 219 at p 225, the Court of Appeal observed:

> In addition, the court possess an inherent jurisdiction to prevent an abuse of its process .... *The use of the court process must be bona fide*.

A FORUM SHOPPING

[45] I find that P is guilty of abuse of process of the court on the following grounds. In the first place, an attempt to forum shop in the context of a tactical manoeuvre is an abuse of process.

B

[46] In *Sykt Rodziah (sued as a firm) v Malayan Banking Bhd* [2021] 5 MLJ 688 at p 716, the Court of Appeal said:

> All these showed that the plaintiff's claim is an *attempt to forum shop in the context of a 'tactical manoevre'* ... In such a scenario this court has the discretion to *strike out the action for abuse of court process*.

C

[47] The factual matrix of this case resembles those in *Jasa Keramat*. Where the Court of Appeal described it as 'one of the worst cases of an abuse of the process I had ever come across'. In that case:

D

(a) disputes arose between the respondent and the first appellant concerning certain payments which the first appellant claimed were due to it from the respondent; and

E

(b) whilst two actions between the parties were pending before the Penang High Court, the respondent commenced a third action at the Shah Alam High Court. Where the respondent obtained an ex parte injunction, which had the effect of staying the two earlier pending actions at the Penang High Court. And nullifying a consent order in the first action for the sums claimed to be paid to a stakeholders' account, without needing to take out an inter partes application to vacate the consent order in that first action.

F

G **[48]** The Court of Appeal in *Jasa Keramat* allowed the first appellant's application to strike out the third action, on the ground that the third action was an abuse of process. The court held:

> There is one matter in regard to the third action which, I think, calls for comment It has to do with the *venue selected by the respondent* for commencing it.
>
> H
>
> *Despite the fact that the first and second actions were already pending before the High Court in Penang, the third action was filed in the High Court at Shah Alam*. Why this change of venue was necessitated is not altogether clear. Counsel for the respondent informed us during argument that Shah Alam was chosen because the respondent's address for service is in the State of Selangor. But I find this explanation unconvincing. The *fact that its address for service is in Selangor did not prevent the respondent from initiating the second action in Penang*. In my view, if the third action was necessary at all; and I use the expression 'if necessary' advisedly; it *ought to have been instituted in the branch of the High Court in Malaya at Penang as that would have been the convenient forum*.

I

Third, the respondent having entered into a consent order in the first action that the retention monies should be placed in a joint account, nullified that order with a stroke of a pen. This it did by *obtaining the further ex parte order in the third action* whereby the retention monies were to be released to it. By so doing, it *bypassed the need for an inter partes application in the first action* to have the consent order vacated. Had such an application been made, the appellants would most certainly have had an opportunity to appear and oppose it. And the respondent having entered into the consent order with open eyes, would have found it most difficult to surmount the obstacles that lay in its path in having that order set aside, especially since it was to the practical advantage to both parties.

Fourth, the respondent *obtained orders in the third action that had the effect of staying the first and second action in the hands of the Penang High Court*. This is a clear *intrusion by one branch of the High Court into the conduct of proceedings that were plainly within the control and supervision of another branch*. ... And I am unable to escape the conclusion in the present case that the orders granted in the third action, on their proper construction, in substance have the effect of *interfering with the power and jurisdiction of the High Court at Penang*.

Lastly, there is the matter of the change in the forum to which I have already adverted. There is *no good reason for the respondent to have approached the High Court at Shah Alam by way of the third action*. It was aware of the first and second actions that were pending before the Penang High Court. The *manner in which the approach was made to the High Court at Shah Alam smacks of an abuse*.

[49] In the present case:

(a) P was already aware that D had filed the KLHC suit on the same subject matter in the Kuala Lumpur High Court at the time P filed the PGHC suit on 11 January 2025 in the Penang High Court;

(b) similar to *Jasa Keramat,* P had no good reason to file the PGHC suit at the Penang High Court. Other than to forum shop with the ulterior motive of obtaining an ex parte injunction to stay the KLHC suit, which 'smacks of an abuse';

(c) this is especially so when the natural forum for the disputes is in the Kuala Lumpur High Court as:

(i) the clauses in the master distributor agreement show P was aware that any dispute ought to be resolved in the Kuala Lumpur High Court, as opposed to the Penang High Court;

(ii) the main business operations under the master distributor agreement were carried out in the Klang Valley, with both parties' respective offices and distribution centers located within the Klang Valley;

(iii) the main representatives of D are based in and reside in the Klang Valley; and

(iv) the solicitors for both parties themselves are based in Kuala Lumpur.

(d) similar to *Jasa Keramat,* P moved this court ex parte by way of a fresh action. When there is already a pending action between the same parties on the same subject matter before a different court (ie the Kuala Lumpur High Court). P did so to enhance its chances of obtaining an unfair advantage (ie staying the earlier KLHC suit) by denying this court the opportunity of hearing the counterparty's version of events; and

(e) P's conduct in the PGHC suit was aimed at staying D's claims in the KLHC suit. P sought to restrain D from 'demanding any sum of money, from the plaintiff, in relation to the contract ... until full and final disposal of this action' (as per prayer 2 of the ex parte injunction application). This would have caused:

(i) this court to intrude and interfere with the power and jurisdiction of the Kuala Lumpur High Court, as held in *Jasa Keramat;* and

(ii) prejudice to D, as it would be restrained from proceeding with its claims against P for the outstanding sum of close to RM65m. In this regard, D had applied for summary judgment in the KLHC suit, which was fixed for hearing on 28 April 2025.

[50] The decision in *Jasa Keramat* is consistent with decisions by courts in other jurisdictions. For example, in *Shih-Hua Investment Co Ltd v Zhang Aidong & 5 Ors* [2018] HKCFI 1234, the plaintiffs suit was struck out on the ground of abuse of process and forum shopping. In that case, the plaintiff had commenced a fresh derivative action (whilst winding up proceedings were pending), with the intention of obtaining an ex parte injunction to restrain any disposal of assets. This was done after the plaintiff's application to freeze all dealings in the winding up proceedings was deferred.

PLAINTIFF HAD KNOWLEDGE OF THE SUBJECT MATTER IN THE KLHC SUIT

[51] P alleges that it had no knowledge of the subject matter in the KLHC suit. Purportedly because the KLHC suit was filed 'without any prior legal demand'. And D's solicitors 'did not disclose any other information pertaining to the KL suit'.

[52] First, it is not true that there was no 'prior legal demand'. As D had, by its notice of breach dated 30 September 2024, demanded that P remedy its breach of the payment terms. Subsequently D had, by its notice of termination dated 3 January 2025, demanded that P make immediate payment of the outstanding sum.

[53] Second, it is also not true that D's solicitors had not disclosed any information when it wrote to Messrs KGK on 9 January 2025, enquiring whether the latter had instructions to accept service of the cause papers. The letter revealed the suit number of the case and named the parties, as shown below.

Re: Kuala Lumpur High Court Suit No. WA-22NCvC-16-01/2025
Tohtonku Sdn Bhd ...Plaintiff
-v-
S.L. Ng Trading Agency Sdn Bhd ...Defendant

We refer to the above matter wherein we act for Tohtonku Sdn Bhd.

2. We are instructed to enquire whether you have instructions to accept service of cause papers on behalf of S.L. Ng Trading Agency Sdn Bhd.

3. Please revert the soonest possible.

[54] It is incredulous that P did not have knowledge that the KLHC suit concerned the termination of the master distributor agreement. As that was the singular event which had ended the business relationship between the parties. Moreover, the following goes to fortify that P did have knowledge that the KLHC suit concerned the termination of the master distributor agreement:

(a) the notice of termination was issued on 3 January 2025. To wit, merely six days prior to P being informed that D had initiated an action against P in the KLHC suit on 9 January 2025;

(b) at the material time, P was aware that it owed D a sizeable amount of monies under the master distributor agreement;

(c) all along, the notice of breach dated 30 September 2024 and the notice of termination dated 3 January 2025 were premised on P's breach of the payment terms;

(d) post issuance of the notice of breach dated 30 September 2024, parties had also exchanged numerous correspondences (ie at least seven letters/email) regarding the notice of breach between September 2024 up until December 2024;

(e) P itself had, by prayer 2 of the ex parte injunction application (filed on 11 January 2025), sought an injunction to restrain D from demanding for payment of the outstanding sum under the master distributor agreement:

(f) P and its two sets of solicitors chose not to respond to D's solicitors letter dated 9 January 2025. P's solicitors only responded on 15 January 2025, after P's ex parte injunction application had been dismissed; and

(g) in any event, P cannot feign ignorance as the cause papers pertaining to the KLHC suit were served on P on 14 January 2025. Yet, P proceeded with the hearing of the ex parte injunction application on 15 January 2025.

DUPLICITY OF PROCEEDINGS

[55] Next, a litigant who files a new suit, giving rise to a duplicity of proceedings when it could have counterclaimed in an earlier suit, is also guilty of abuse of process (see the High Court case of *Seetha a/p Kumarasamy v Aker Solutions Malaysia Sdn Bhd (sebelum ini dikenali sebagai Aker Kvaerner Malaysia Sdn Bhd) & Ors* [2022] MLJU 3277; [2022] CLJU 3049).

[56] Here, P's statement of defence in the KLHC suit was filed on 12 February 2025. To wit, two days after my decision on 10 February 2025 dismissing the ad interim injunction application. It raises identical and overlapping issues as those raised by P in the PGHC suit.

[57] P could have counterclaimed in the KLHC suit. But instead chose to file this collateral and duplicitous PGHC suit.

TRANSFER APPLICATION

[58] In respect of the transfer application, even though P first proposed for the PGHC suit to be transferred to the Kuala Lumpur High Court on 16 January 2025, it did not file the transfer application until almost one month later on 14 February 2025.

[59] Subsequent to its proposal on 16 January 2025, P actively prosecuted the PGHC suit on the basis that the Penang High Court is the forum conveniens by:

(a) filing the inter partes injunction application with a certificate of urgency on 20 January 2025;

(b) seeking an early hearing date for the ad interim injunction application during the case management on 24 January 2025;

(c) writing an email to the Penang High Court on 24 January 2025, stating that the PGHC suit was 'seiras dengan prinsip 'forum conveniens';

(d) stating on oath in its affidavit in reply dated 6 February 2025 in respect of the inter partes injunction application that the PGHC suit was 'filed ... in line with the doctrine of forum conveniens'; and

(e) proceeding with the hearing of the ad interim injunction application on 10 February 2025.

[60] It was only after P had failed to obtain the ad interim injunction that it subsequently filed the transfer application four days later on 14 February 2025. Now, P contends that the Kuala Lumpur High Court is the forum conveniens and if the transfer application is allowed, 'the defendant's concern of 'forum shopping' ... will be resolved in toto'.

[61] I consider P's transfer application to be yet another attempt to abuse the process of the court. It is an afterthought made after I had ruled against P on 15 January 2025 (when dismissing the ex parte injunction application) and 10 February 2025 (when dismissing the ad interim injunction application) to:

(a) scuttle the hearings or avoid potential unfavourable determination in the inter partes injunction application and the striking out application, in light of the earlier adverse findings which are also relevant to both pending applications; and

(b) switch forum for the determination of the inter partes injunction application and the striking out application to enhance P's chances of success.

[62] Any attempt to forum shop by a litigant to avoid an adverse finding being made against him is an abuse of process. I refer to the following authorities.

[63] In *Casperz v Garry & Warren Smith Pty Ltd (Civil Claims)* [2022] VCAT 1102, Victorian Civil and Administrative Tribunal, the President (Justice Quigley) held:

> 26 It would be an improper use of the reconstitute power to order a reconstitution of the Tribunal based on a perception that mere dissatisfaction with the outcome of a hearing by an Applicant amounts to bias or to a suggestion that a Tribunal member might not bring an open mind to the determination of the matters before that member.
>
> 27 Equally, it would be an *improper* use of the reconstitution power to effectively *forum shop*, avoiding any member who has made an *adverse merits finding or a direction which is not to the litigant's liking*.

[64] In *Adrian Casperz v Garry & Warren Smith Pty Ltd & Ors* [2023] VSCA 264, the Supreme Court of Victoria, Court of Appeal held:

> 20 ... It is a fundamental precept that *parties do not get to choose the member which will hear their case*. That type of *forum shopping*, if it were permitted, would *undermine the independence and impartiality of the Tribunal* in a most serious way.
>
> 24 ... An application for a member to disqualify themselves should never be merely a reflex to an unfavourable decision

[65] It is said that the courts have 'always intervened in such cases and set the matter right'. In *Jasa Keramat,* the Court of Appeal observed (at p 647):

> Abuse of process in the context of a step taken in the proceedings would, in my judgment, include the use of interlocutory relief as an instrument of oppression. The law provides for remedies, both interim and final, to a litigant to set right, or to prevent, some harm or injury that has been done or may be reasonably apprehended. It is plainly an abuse of the court's process where relief at law or in equity is used, not to remedy a genuine grievance, but as an instrument of oppression. There have been instances before our courts where an interlocutory injunction has been found to have been used as an instrument of oppression. We have always intervened in such cases and set the matter right.

[66] To make matters worse, P maintained that the Penang High Court is the forum conveniens even after filing the transfer application, by stating on oath:

(a) on 24 February 2025 in its affidavit to oppose the striking out application that the PGHC suit was 'commenced in Penang in view of s 23(1)(b) of the Courts of Judicature Act 1964' (see para 9.3 of P's affidavit dated 24 February 2025 in encl 32);

(b) on 4 March 2025 in its affidavit in support of the inter partes injunction application that the PGHC suit 'aligns with the principles regarding forum conveniens' (see para 6.2 of P's affidavit dated 4 March 2025 in encl 38); and

(c) on 14 March 2025 in its affidavit in support of the transfer application that the PGHC suit 'is in accordance with the legal principles of 'forum conveniens' and also s 23(1)(b) of the Courts of Judicature Act 1964' (see para 9.2 of P's affidavit dated 14 March 2025 in encl 50).

[67] The inconsistent positions taken by P regarding the forum conveniens for the disputes demonstrates that it is abusing the process of the court.

NO GOOD REASON FOR THE PLAINTIFF TO APPROACH THE PENANG HIGH COURT

[68] P alleges that the PGHC suit and the ex parte injunction application were filed in the Penang High Court solely because 'the defendant's addresses are located in Penang'. This does not make sense considering that all the other more important factors to determine forum conveniens point towards the Kuala Lumpur High Court as being the natural forum.

[69] On this aspect, recall: (a) the jurisdiction clause in the master distributor agreement (which specifies 'the courts in Kuala Lumpur'); (b) D's address in the master distributor agreement (ie Subang Jaya, Selangor); (c) the

main place of business (which is in the Klang Valley); (d) the place of residence of D's witnesses (ie its executive director and its group finance, procurement and supply chain lead, who reside in the Klang Valley); (e) the place where all the solicitors for the parties are based at (in Kuala Lumpur); and (f) knowledge of the existence of the KLHC suit.

[70] In addition, there is also no good reason for P to have gone out of its way to file the PGHC suit in the Penang High Court (whilst fully aware of the existence of the KLHC suit), when P's registered office is situated in Johor Bahru. This is reflected in the company search on D and in the master distributor agreement.

[71] P further alleges that the inter partes injunction application was filed on 20 January 2025 due to a 'non-response' by D to P's solicitors letter dated 16 January 2025, regarding the proposal to transfer the PGHC suit to the Kuala Lumpur High Court. The suggestion that there was wrongdoing on the part of D is disingenuous, considering that P's proposals in its solicitors' letter dated 16 January 2025 was not sincere.

[72] P's solicitors' letter dated 16 January 2025 (which was sent on Thursday at 5.58 pm) contained two proposals. It required a response within 24 hours.

a) Given that there are now two suits pending before the High Court of Penang and High Court of Kuala Lumpur respectively, our client proposes to file an application to transfer the suit in Penang to Kuala Lumpur in order for both suits to be heard together.

b) In this regard, kindly let us know if your client is agreeable to the same in order for us to proceed accordingly.

d) In view of the ongoing litigation between parties, our client proposes that your client cease to act on such termination pending the outcome of the suits in order to preserve the integrity of the same.

e) In view of the urgency of the matter, kindly also let us have your client's instructions on para (d) above within **twenty-four (24) hours hereof** in order for us to advise our client accordingly.

[73] The first proposal is to transfer the PGHC suit to the Kuala Lumpur High Court, to be heard together with the KLHC suit. The second proposal is for D to cease to act on the termination of the master distributor agreement. Notably, P did not disclose that its attempt to obtain an ex parte injunction had

A been rejected by the court on 15 January 2025.

[74] D's solicitors replied on the following day on 17 January 2025 (Friday), stating that it was seeking D's instructions. Which was reasonable considering that:

B

(a) D was only served with the cause papers pertaining to the PGHC suit on 15 January 2025, and needed time to study the cause papers and consider P's proposals; and

C (b) by that time, D had already appointed seven new distributors. D had to consider the implications of P's proposal on such appointments.

[75] On 20 January 2025 (Monday), P proceeded to file the inter partes injunction application with a certificate of urgency. P served the cause papers D on D's solicitors on 22 January 2025 (Wednesday), revealing the filing of the ex parte injunction application.

[76] In short, no time was given to D to consider the proposals in P's solicitors' letter dated 16 January 2025. It seems to me that this letter was E intended to:

(a) pressure D into making a quick decision (without having knowledge of the ex parte injunction application), to agree that the PGHC suit be transferred to the Kuala Lumpur High Court; and

F (b) attempt to forum shop, after I had made an adverse finding in the ex parte injunction application (ie that damages would be adequate remedy) the day before on 15 January 2025.

G **[77]** Finally, P contends that it was entitled to file the PGHC suit in the Penang High Court 'considering the both the High Court of Malaya in Kuala Lumpur and Penang are, in fact, the different branch of the same jurisdiction'. This contention is misconceived, given the circumstances of the present case. In this regard, I quote the remark of the Singapore Court of Appeal in *Lakshmi* H *Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at p 376:

> 1 Forum selection is an extremely crucial process to any would - be litigant for a host of substantive, procedural, tactical and strategic reasons. While it is usually the prerogative of a litigant to decide on the forum in which to bring his claim, the *common law has developed a set of principles and rules to curb forum shopping and to* I *prevent the abuse of process*.

CONCLUSION

[78] For the reasons above, I allowed the striking out application by D in encl 17 and struck out P's suit herein. I ordered P to pay global costs of RM30,000 to D.

PG Suit and transfer application stuck out; and ad interim injuction application dismissed.

Reported by Ashok Kumar